IN THE CIRCUIT COURT FOR THE COUNTY OF WYTHE, VIRGINIA.

COMMONWEALTH *v.* CLAUDE ALLEN *et als.*

1. **Crime—Intent—Action.**—Crime is the concurrence of intention and action and is measurable by the character of the intent and the natural and probable occurring consequence of the act.

2. **One Act—Two Crimes.**—Where a general evil intent prompts an act which, as its natural and probable consequence, results in the death of two persons, there may be separate prosecutions for the murder of each.

3. **Former Jeopardy—Plea.**—Where defendant relies upon a plea of former jeopardy he must definitely and substantially show by the allegations of his plea the identity, both in law and in fact, of the two offences.

4. **Crimes—Res Adjudicata.**—No fact, however essential to a verdict, is by such verdict *res adjudicata* against the Commonwealth in a criminal case, unless there is such identity of offences as would support a plea of former jeopardy.

5. **Principals in the Second Degree—Acts and Declarations of Principal in First Degree.**—The motives and purpose of a principal in the First Degree are directly in issue on the trial of the principal in the Second Degree and to show such motives and purpose the acts and declarations of the former, although not made in the presence of the latter, may be introduced.

Upon indictment for murder of Wm. M. Foster.

S. Floyd Landreth, Commonwealth's Attorney for Carrol County; *Stuart B. Campbell,* Commonwealth's Attorney for Wythe County; *J. C. Wysor, W. S. Poage* and *Jno. S. Draper,* for the Commonwealth.

N. H. Hairston, R. H. Willis, N. P. Oglesby, W. W. Coxe and *C. Francis Cocke,* for the defendant.

OPINION.

WALLER B. STAPLES, J.: Claude Allen and his seven co-defendants were jointly indicted under five separate indictments for the murder of five different persons.

Indictment No. 1, for the murder of Judge Thornton L. Massie, in its first count, charges a conspiracy to murder Judge Massie, Wm. Foster, L. F. Webb, and Dexter Goad, and the consequent murder of Judge Massie; in its second count a conspiracy to murder Judge Massie and his consequent murder, and in its third count, in common law form, the murder of Judge Massie.

Indictment No. 2 for the murder of Wm. M. Foster, in its first count, charges conspiracy to murder Judge Massie, Foster, Webb and Goad and the consequent murder of Foster; in its second count a conspiracy to murder Foster and his consequent murder, and in its third count, in common law form, the murder of Foster. The remaining three indictments are in like form charging murder of Webb, Fowler and Ayers respectively. All charges of conspiracy are expressly made by way of inducement; the conspiracies are merged in the consequent murders; their legal identity is destroyed by the merger (State *v.* Potts, (Ia.) 5 L. R. A. 814; Anthony *v.* Commonwealth, 88 Va. 847, 850, 14 S. E. 834), and the fact that the same identical conspiracy is charged, by way of inducement in the first count of each indictment, gives of itself no identity to the consequent murders; that several offences are pursuant to the same conspiracy gives no identity. View of the author in note 92 Am. St. Rep. 134.

Claude Allen was tried separately upon indictment No. 1, with a verdict of murder in the second degree; on his motion judgment was delayed that he might not be incapacitated as a witness for his co-defendants.

On calling indictment No. 2 for the separate trial of Claude Allen he interposed his special plea in bar No. 1 alleging the indictment No. 1, the trial and verdict thereon, following with certain allegations of identity of offence hereinafter referred to, and praying discharge from prosecution under this second indictment; to which plea the Commonwealth demurs. The object and purpose of the plea is to interpose the defense of former jeopardy and in whatever form it is raised there must be the underlying question of the identity of the offences charged in the two indictments.

But first as to the form of the plea:

As a plea of former conviction it is bad because alleging no judgment; as a plea of former acquittal it is bad as praying for discharge, since such verdict acquits only of murder in the first degree. But as to a plea of former jeopardy, being predicated neither of conviction or of actual acquittal, it would seem clear that such a plea should allege some occurrence between swearing the jury and the verdict which operated prejudicially to the defendant and which has the legal effect of an acquittal; no such occurrence is alleged.

If by alleging judgment the plea could be made good the court would delay trial on the second indictment until judgment on the first was entered, but if the plea amended by alleging judgment would still be bad, no such delay is called for.

Then is there a sufficient allegation of the identity of the offences, for upon this fact turns the value of the plea either as a

plea of former conviction, former acquittal or former jeopardy. If the identity of the offences is not properly alleged the plea is fatally defective.

To bar a second prosecution the first must have been for an offence identical with the second both in law and fact. 4 Blackstone 336; Burton *v.* United States, 202 U. S. 344, 380, 50 L. Ed. 1057. It is not sufficient that the acts were the same, but the crime must have been the same, Morey *v.* Commonwealth, 108 Mass. 433. Jeopardy is not of the act, but of the offence. Arrington *v.* Commonwealth, 87 Va. 96, 100, 12 S. E. 224.

Under what circumstances may two crimes result from one immediate transaction.

The plea alleges in this respect that the two offences "are one and the same *act or crime* because if done at all both of said alleged crimes were brought about by and are the result of the same act, impulse or endeavor, at the same time, at the same place, and as a result of one and the same instantaneous and immediate transaction, and are one and the same crime."

Note the language of the plea: "Are one and the same *act* or *crime*" and the language of Mr. Justice Harlan in Burton *v.* United States, 202 U. S. 344, 380, 50 L. Ed. 1057: "The plea will be vicious if the offence charged * * * be perfectly distinct in point of law, however nearly they may be connected in fact."

Assuming however that the plea properly alleges that the two deaths resulted from one single physical act, one and the same shot:

Crime is *dependent* upon concurrence of intention and action, but penal consequence to the actor often varies with the accident of result as likewise does the nature, character and degree of the crime. 1 Bishop New Cr. Law, paragraphs 325-327.

One single act may often have a double penal consequence to the actor. Where two different distinct and independent correlated facts must be proven to support the different charges (Arrington *v.* Commonwealth, 87 Va. 96, 101, 12 S. E. 224), there may be two crimes. In that case one single sale of liquor was twice prosecuted for and punished, once as a Sunday sale and once as a sale without license. Only one act of the defendant was proven, to-wit, the sale—two different and distinct facts, each correlated to that act, were necessary in the two cases, in the one that it was on Sunday, in the other that it was without license.

Counsel for defendant predicate a distinction upon Morganstern *v.* Commonwealth, 94 Va. 787, 26 S. E. 402. This case merely holds that where a statute makes any one of several enumerated acts an offence, it is not duplicity to allege in one count

the committing of two or more of such acts. The test of duplicity in pleading is not an exclusive test for duplicity in crime. Two crimes distinctly severable may together constitute a third distinct offence; such as larceny and assault constituting robbery; or several illegal acts constituting an illegal occupation, or continuing adultery constituting unlawful cohabitation, etc.; or concurring assault upon two constituting a breach of the peace; it may often be that there is a merger and it is true a prosecution for the combination will bar a prosecution for either constituent (1 Bishop's New Criminal Law, § 1062, p. 639), but where the two taken together may not constitute a third I have seen no case except the "single act" cases hereinafter referred to, sustaining the bar of one by the other, of two different assaults or two different murders or crimes of that character.

We come then to the "single act" cases. Is there a different consequence to the murderer if one instead of two shots causes the double death. Numerous cases hold this distinction. Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369, 376, and citations. This case is not satisfactory. The question is not fully discussed, and the only cases cited are larceny cases, except one where an indictment charging poisoning of three persons was held not bad for duplicity. Moreover in State *v.* Elder, 65 Ind. 282, 32 Am. Rep. 69, the same court takes a directly contrary view, holding that an attempt to commit an abortion is a different crime from the murder of the unborn child caused while making such attempt. Here the court selects three classes of cases where "the same facts" result in double wrong. First, where offences may be divided into several parts, each a separate offence, as larceny from two persons. Second: Where facts constitute two offences, and the lesser is merged in the greater, as larceny in robbery, etc. (See Stuart's Case, 28 Gratt. 950.) And third, where facts constitute two offences, and there is no *necessary* merger. In first and second classes there can be but one conviction; in the third class there may be as many convictions as there are persons injured.

In People *v.* Majors, 65 Cal. 138, 52 Am. Rep. 295, Majors counselled and advised J. to rob R. In the absence of Majors, J. attempting to rob R. killed both R. and McI. "at the same time about 6:30 p. m." Held, Majors could be convicted of the murder of each. The court reviews numerous cases, approving among others Vaughan *v.* Commonwealth, 2 Va. Cases 273.

In State *v.* Nash, 86 N. C. 650, 41 Am. Rep. 472, two shots were fired in quick succession into a crowd and two persons shot; held to be two distinct offences, saying "though there be but a single act of violence committed, yet if its consequence affect two persons there must be a corresponding number of dis-

tinct offences committed." This is almost the identical language of Fox *v.* State, 50 Ark. 528, approved in In re Allison, 13 Colo. 525, 16 Am. St. Rep. 224, 229.

Mr. Wharton suggests (Crim. Pld., § 468) that the grades of offences may differ where two killed by one shot, as may the defences available, and that both may therefore be prosecuted. Mr. Bishop in his first edition of Criminal Law, paragraph 1060 expresses some doubt.

In Teat *v.* State, 53 Miss. 439, 24 Am. Rep. 708, 715, T. and S. from ambush fired simultaneously two shots at G. and W. and killed both. Held T. could be tried separately for the murder of each.

Gunter *v.* State, 111 Ala. 23, 56 Am. St. Rep. 17, distinguishes between killing of two by one shot and by two successive shots, holding that in the first case there is but one crime, in the second case there are two. Such a distinction requires a remarkable refinement of reasoning and is predicated upon no sound or necessary principles of law. To say that two shots fired in quick succession by the same hand, with the same intention, impelled by the same motive, but resulting in the death of two persons constitute two crimes, whereas one single shot fired with the same single intent, impelled by the same single motive, and accomplishing the same result, constitutes but one crime, is to measure crime solely by quantity of action regardless of character of such action or of intention or result. The action and intent are the same in shooting with intent to kill as in murder; the two differ only in results. Action and intention are necessary elements but result in such cases is the final measure of the crime. In Vaughan *v.* Commonwealth, 2 Va. Cases, 273, defendant was indicted for maliciously shooting a child while in its mother's arms, was acquitted and then indicted for shooting the mother. There was but one shot; former acquittal was pleaded, there was a conviction and writ of error was refused. In Smith *v.* Commonwealth, 7 Gratt. 593, syllabus 1, "a conviction for advising, etc., one slave to abscond is no bar to a prosecution for advising, etc., another slave to abscond, though the advising, etc., was to both at one time and by the same words and acts." Plea alleged these facts, demurrer thereto was sustained, and on appeal affirmed without opinion. In Commonwealth *v.* Quann, 2 Va. Cases 89, the first indictment was for forging and *uttering* a certain paper, and there was an acquittal. The second indictment was for obtaining goods by a false privy token, etc. Plea alleged the "token" was the same paper of the forgery and utterance of which he had been acquitted. On question adjourned to the General Court demurrer to plea was sustained.

In re Allison (Colo.), *229* Am. St. Rep. *229*, it was held that where an unlawful act operates on several objects there may be several offences and several prosecutions, citing Wharton's Cr. Pl. & Pr., 9th Ed., paragraph 468.

But counsel for defendant contend that the identity of offences does not depend so much upon the two deaths being the result of a single physical act as upon their being the fruit of a single intent.

The answer to this is plain. First, in crimes of this character, the intent need be specific. If it is a general evil intent followed by action, it becomes the parent of all natural and probable consequences of such action. 1 Bish. New Criminal Law, §§ 323-328. Therefore the reckless, malicious shooting by A. into a crowd with consequent death of B., a stranger to A., is murder. The intent to kill is presumed, because it is the natural and probable consequence, nor will it avail him that he established clearly a total absence of specific intent to kill B. If he intends to kill. then his intent becomes criminal to the extent of every natural and probable victim. So if a man throw dynamite into a crowd to kill B., he cannot avoid the conclusion that he intended to kill others besides B. This is a necessary conclusion from Vaughan's case; from the third class set out in Elder's Case; from Major's Case and Nash's Case, all supra.

Second: The distinction is unsound as clearly illustrated by the doctrine of conspiracy and the facts in Major's case. A conspirator is amenable for *all* acts done by his co-conspirators in furtherance of the common design, etc. The rule has never been stated that he is amenable for *any one* act but for *only one* of the acts so done. Yet in forming the conspiracy he may have a single motive and intent and may be wholly absent from the scene of its execution. The whole theory of his responsibility rests upon the conclusive presumption that he foresaw, intended and authorized *all* the natural and probable consequence of the unlawful enterprise, the unlawful acts planned, directed or acquiesced in.

Judge Freeman recognizes no such distinction. In a most elaborate note, 92 Am. St. Rep. 90, he reviews this subject and concludes that there are possibly more cases which distinguish in this respect between the effect of one and the effect of two successive acts than there are cases denying this distinction, but gives no opinion on the subject; but, he does say upon page 121: "The rule, however, is to be strictly confined to the case where the same act occasions both deaths. If one shot is fired and injures two people there is as we have seen, a conflict of authority as to the possibility of separate and successive prosecutions. But where several shots are fired, each injuring one person, the

mere propinquity in point of time or action of the two assaults, does not make them a single assault, and all the authorities agree in holding that there may, in such a case, be as many prosecutions as there were assaults." The weakness of the reason for this distinction has been suggested above. It would seem that the Virginia court in Vaughan's Case, Kinney's Case, Day's Case, if not in Quann's Case, declined to recognize it.

The test prescribed by Mr. Justice Buller in Rex *v.* Vandercomb, approved in Arrington *v.* Commonwealth, 87 Va. 96, 12 S. E. 224, and Page *v.* Commonwealth, 27 Gratt. 954, in State *v.* Elder, 65 Ind. 282, 32 Am. Rep. 69, decided after Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369, and in State *v.* Nash, 86 N. C. 650, 41 Am. Rep. 472, in Archibald's Cr. Pr. & Pl. 112, Wharton Cr. Pl., § 468, and 1 Bishop New Cr. Law, § 1053, is that the evidence necessary to convict on the second indictmen should have been sufficient to convict on the first indictment. Applying this test to the plea at bar it is not *necessary* on the second trial to show the murder of Judge Massie in order to convict of the murder of Foster, but without proof of this fact defendant could not have been convicted of the murder of Judge Massie.

So on a charge of murder, defendant may, as principal in the second degree, be convicted of a killing done by another; he may likewise be answerable for concurring acts of two other persons; as if A stand by and encourage B & C in their attempt to kill D; —B may in such attempt kill E and C may in such attempt kill F, his act may be one act, his intent one intent, his motive one motive, yet inasmuch as the facts necessary to prove the killing of E by B even if admissible would be clearly insufficient to prove the killing of F by D, there are certainly two distinct crimes in law and in fact—the test applied shows them to be so; yet this state of facts might be covered by the language of the defendant's plea in this case. If the Commonwealth traverse the plea, proof of such a state of facts so covered by it would entitle defendant to judgment thereon and discharge. True the Commonwealth might reply specially to the plea, but if such replication set up only what might be proven under a traverse, it would be bad inasmuch as it would present no estoppel, neither would it confess and avoid. The demurrer questions the legal sufficiency of what might be proven under the plea.

In State *v.* Nash, 86 N. C. 650, 41 Am. Rep. 472, the test in Rex. Vandercomb is thus expressed: "Could the defendant have been convicted upon the first indictment upon proof of facts (not brought forward in evidence) but as alleged in the record on the second" and if it appear manifest from inspecting the two indictments that the offences charged could not be the same, averment could not show them to be so because that would be to

contradict the record. Citing Rex *v.* Taylor, 3 B. & C. 502. Here the first indictment was for the murder of Judge Massie. Could defendant possibly have been convicted thereof on proof of the killing of Foster. Not on evidence which happened to be admissible in that trial, but on proof necessary for the conviction thereon? But admitting that the identity of the offences would be established by their being the result of one single act and one single intent, does the plea allege enough to require or even justify the conclusion that the defendant means to assert and expects to prove that both Judge Massie and Mr. Foster were killed by the same single shot. The conspiracy charged as an inducement and merged in the two felonies does not thus connect them. The language of the plea would seem carefully chosen to avoid this express allegation.

Gunter *v.* State holds that an allegation of "one and the same assault committed at one and the same time and one and the same transaction" is not a good allegation, as successive shots might be shown under such allegations, and Treat *v.* State holds that the absence of clear and express averment that in point of fact one shot killed both the plea is bad. Also Burton *v.* U. S., supra.

True it is such pleas are not subject to the test of strict formality, but its very essence consists of the identity of the offences and its value is absolutely dependant thereon. Since the plea is bad, as first pointed out, and amendment to aver judgment can only be made after long delay, is it unreasonable to require of the defendant that he allege specifically the absolutely essential fact which he contends gives identity to the two offences wherewith he is charged. The record vouched does not even suggest such identity; on the contrary, is scarcely consistent therewith, and without weighing my knowledge of the facts from having heard all the evidence in this case, I am fully persuaded that the plea as drawn presents no sufficient bar to the prosecution.

ADDENDUM No. 1.

But counsel for defendant suggest that this is a case in which the court should exercise a sound discretion to prohibit successive and vexatious prosecutions, and that a consolidation of all remaining indictments against this defendant should be required. Granting that such a discretion may be vested in the courts, whereby they may go further in limiting prosecution than the constitutional prohibition of double jeopardy; I should have preferred to express no opinion as to whether the merits of this case would call for the exercise of this discretion; but since the motion has been submitted, it is sufficient to say that I can see here no appropriate occasion therefor. The magnitude of the crime committed, the extent of the consequences, the character

of its victims, the invasion and destruction of a court of justice, amount to such an immeasurable violation of the peace and dignity of the Commonwealth that the court before which those charged therewith are arraigned, must leave the character and extent of the prosecution therefor to the State's prosecutors, to be conducted in the mode and under the rules and limitations prescribed by law.

ADDENDUM No. 2.

After the foregoing, defendant has tendered his special plea in bar No. 2, setting up the verdict in the first case as preventing a prosecution for murder in the first degree on this indictment. If it is a plea of former acquittal this plea raises the same question of identity of offences above disposed of. If it is a plea of matter adjudicated it would be addressed only to the first count in the indictment, since the only fact possible to have been adjudged was the conspiracy charged therein. This would certainly not prevent the Commonwealth from proving the actual murder of Foster by Claude Allen, or Claude Allen's guilt as a principal, in the second degree. If a mere "fact in issue" in a criminal case, may ever be res adjudicata against the Commonwealth (Justice *v.* Commonwealth, 81 Va. 209; Hotema *v.* United States, 186 U. S., 413, 46 L. Ed. 1225) it could not in this case prevent a verdict of murder in the first degree predicated upon other facts. Therefore, the plea No. 2 is bad, and demurrer must be sustained.

ADDENDUM No 3.

Defendant offers in evidence the record in his first trial with the contention that the verdict of murder in the second degree operates as an estoppel against the Commonwealth to contend that he is guilty, by reason of the conspiracy charged (by way of inducement) in the first count of the indictment. Claiming that the said verdict is in effect a finding that he was no party to such a conspiracy; that the matter is therefore res adjudicata.

In Hotema *v.* United States, 186 U. S. 413, 46 L. Ed. 1225, it was held that a verdict of not guilty of one homicide because of insanity did not preclude the United States from asserting the sanity of the same defendant on a trial for a second homicide committed upon the same day, but the question is not discussed. Several Massachusetts cases (see Commonwealth *v.* Ellis, 160 Mass. 165, 35 N. E. 773 and citations) hold that a fact necessarily determined by a verdict in a criminal case becomes res adjudicata and Cyc. (vol. 23 p. 1347, par. 7) expresses this view, but our Court of Appeals, in Justice *v.* Commonwealth, 81 Va. 209, takes the contrary view, expressly holding that such an

estoppel cannot be invoked against the Commonwealth, and this view is adopted in North Carolina. This would seem to be the rational view. A verdict of not guilty need mean no more than a finding of "not proven" and considering the greater requirements demanded of the State in criminal trials, and that she has no appeal in such cases, she might be precluded in her most important prosecutions because of some clearly erroneous judgment of a trial justice; hence, it is well settled in Virginia that an acquittal by a Justice of a misdemeanor does not bar a prosecution for a felony predicated of the same transaction. Which could not be the case if the act charged were adjudged lawful with conclusive effect as to the fact thus necessarily determined. A verdict of not guilty cannot avail defendant except in support of a plea of autrefois acquit. Lord Erskine says that "when a prisoner pleads not guilty and puts himself upon his country the jury is charged with his deliverance from the crime itself, and not specially from any fact or facts in the commission of which the crime is charged to consist, much less from any single fact to the exclusion of others charged upon the same record." But were this view not correct, how should the question be decided applying the estoppel as in civil cases. Before such an estoppel can be invoked, it must appear that the matter so estopped was the *basis* of the judgment (or perhaps verdict in a criminal case) relied on (Black on Judgments, par. 507 and opinion of Judges Keith and Cardwell in Douglass Land Co. *v.* Thayer Co., 18 Va. L. R., 197, 74 S. E. 215). For if anything is left to conjecture, there is no estoppel (Black, par. 728). The following test may therefore be applied to an estoppel alleged against the plaintiff in a civil action.

First: If there is only one fact which it is necessary for the plaintiff to prove before he can prevail, and he fails on his issue, then that fact is necessarily adjudged against him, and he is forever estopped to reassert it against the same defendant; but

Second: If there are two or more facts, *all* of which he must establish before he can prevail, and he fails on his issue, there is no estoppel as to either of said facts, since his failure to establish any one of such facts defeats him and it cannot be ascertained as to which one of said facts he failed in his proof; nor can it be concluded that necessarily he failed in more than one of them.

Now apply this to the question presented.

If to secure a verdict of murder in the first degree on the first trial the burden was on the Commonwealth to establish more than one fact (in addition to what the verdict of murder in the second degree does establish) then there can be no estoppel. Consider then the Commonwealth's fourteenth instruction which

is predicated upon the same conspiracy charged (by way of inducement) in the first count of the present indictment.

Commonwealth's instruction, No. 14, abbreviated, was as follows:

"If * * * Claude Allen conspired with either of his co-defendants to kill Massie, Foster, Webb and Goad and pursuant to said conspiracy Thornton L. Massie was by any one of said conspirators wilfully, deliberately and premeditately killed while * * * Claude Allen was present * * * then Claude Allen is guilty of murder in the First Degree."

Now, if only this conspiracy must be added to what was found by the verdict of murder in the second degree, then the rule would apply. If only the conspiracy need to be added, then that instruction might conclude thus:

"But if you find the defendant conspired as aforesaid, then it necessarily follows that the killing of Judge Massie was done pursuant to such conspiracy, and was done wilfully, deliberately, and premeditately."

Clearly such addition would render the instruction vicious, and it as certainly follows that the jury in determining between murder in the first and second degrees were not limited in their inquiry solely to the question of the conspiracy, even though it may have been considered necessary to find the fact of such conspiracy; for they would be required to further find that such murder was done by the defendant; or by a co-conspirator pursuant to the conspiracy, and in either case, wilfully and with deliberation and premeditation. The fact of the conspiracy might be evidence of great weight to show such premeditation and deliberation, or that the killing was done pursuant thereto, but it cannot be held conclusive of these facts. The verdict does not necessarily establish that the killing was actually done by the hand of the defendant since he may have been convicted as a principal in the second degree. But even if it did necessarily so establish, still the mere fact that it was done after the conspiracy would not necessarily mean pursuant thereto, or with deliberation and premeditation, however strong might be such an inference. Post Hoc is not necessarily Propter Hoc.

Nor would a finding that the murder was not done pursuant to a conspiracy necessarily include a finding that there was not a conspiracy.

The record offered will be excluded.

ADDENDUM No. 4.

Since the foregoing was written, the defendant has been convicted of murder in the first degree on his second trial and his counsel rely with much appearance of confidence upon their con-

tention that the Court erred in admitting on this trial of Claude Allen the evidence of several witnesses to the effect that at various times after the May, 1911, term of Court and between that time and the day of the tragedy Floyd Allen stated to different persons in substance that if he was convicted of the charge then pending against him and upon which he was afterwards being tried when the tragedy occurred, he would kill Wm. Foster before night or blow a hole in the Court.

The Commonwealth contended that Claude Allen was guilty upon each of three theories:

First, as a conspirator.

Second, as present aiding and abetting Floyd Allen, who actually fired one of the fatal shots which hit Wm. Foster, and

Third, that Claude Allen himself fired one of said fatal shots.

There was direct evidence sufficient to make out a prima facie case under each theory. Should there be any doubt as to the admissibility of this evidence as the acts and declarations of a co-conspirator it was clearly admissible under the second theory. If Claude Allen was present aiding and abetting Floyd Allen in firing one of the fatal shots which struck Wm. Foster, his guilt or innocence as a principal in the second degree was dependent upon the guilt or innocence of Floyd Allen.

Proof having been adduced that Floyd Allen fired at Foster the jury had the right to find that Floyd Allen killed Foster and it then became a matter of pertinent and necessary inquiry as to the motive and purpose which actuated Floyd Allen in firing at Foster and these declarations of Floyd Allen and his relations with Foster were clearly relevant and proper to show that motive and purpose.

The jury, however, were instructed that such threats were to be considered only to show the motive and purpose which actuated Floyd Allen.

In Howard *v.* State, 109 Ga. 137, 34 S. E. 330, Lumpkin, P. J., says: "Such parts of these declarations as embraced incriminating admissions or confessions on the part of Ford (principal in the first degree on the trial of one charged as principal in the second degree), tending to show his guilt were admissible in evidence; for it was necessary for the State to prove that Ford was guilty as a principal in order to establish the guilt of Howard as an accessory and any pertinent testimony tending to show the essential fact was certainly admissible."

Mr. Wigmore citing this case in Vol. 2 of his work on Evidence, § 1079, page 1282, says: (c) That the confession of a principal is admissible on the trial of an accessory to evidence the commission of the crime by the principal seems clear on the present principle, supposing some evidence of the defendant's co-operation to be first furnished.